IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 93

UNITED STATES OF AMERICA,

Petitioner,

vs.

DANIEL J. KOENIG.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT

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BRIEF OF THE RESPONDENT

Question Presented

The question as phrased by the petitioner is acceptable.

Statutes Involved

18 U.S.C. 3731 states, in part:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count

thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted."

28 U.S.C. 1291 provides:

Final decisions of district courts.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended October 31, 1951, c. 655 § 48, 67 Stat. 726."

Rule 41 (e), Federal Rules of Criminal Procedure, states:

(e) Motion for Return of Property and to Suppress Evidence.

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the

warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made *in the district where the trial is* to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Statement of the Case

Respondent accepts the petitioner's Statement as set forth in its Brief, but further calls to this Court's attention that on the night of September 29, 1959, ten agents of the F.B.I. searched his residence, curtilage, garage and automobile (Tr. 61)[1] pursuant to instruction by teletype to the F.B.I. Miami office to "'attempt to locate and apprehend Koenig, being alert for ideal search situation incidental to arrest'" (Tr. 279).

ARGUMENT

The issue in this case is the appealability of an order granting the respondent's motion to suppress, under Rule 41 (e) of the Federal Rules of Criminal Procedure, entered in the Southern District of Florida, the district of seizure, affecting the admissibility of evidence, which the petitioner will be attempting to introduce in the criminal trial to be held in the Southern District of Ohio.

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[1] "Tr." refers to the transcript in the court of appeals which has been filed with the Clerk of this Court.

Prior to the filing of the motion, a complaint, which was subsequently determined to be invalid, had been filed against petitioner in the Southern District of Ohio. Subsequent to the filing of the motion, but before the order was entered, an indictment was filed in the Southern District of Ohio. The court of appeals held that, despite the fact that the order was entered in a district other than the district of the indictment, it was not appealable.

The petitioner has now adopted the view that the Fifth Circuit Court of Appeals "was correct that the order of the district court was not properly appealable" (Introduction of Argument, Petitioner's Brief), and is now arguing, as the Respondent has consistently maintained, that (1) this Court has never decided that an order on a motion to suppress evidence entered in a district of seizure, which said district is different from the district in which the trial is to be had, is as such a "final" order in an independent plenary proceeding; and (2) that the dictum in *Cogen* v. *United States*, 278 U.S. 221, and in *Carroll* v. *United States*, 354 U.S. 394, is not conclusive and should not be followed.

In its petitions for certiorari in both this case and in *DiBella* v. *United States*, No. 21 this Term, the petitioner has steadfastly contended—and the respondent has been and is continuing to be in accord—that an order granting or denying a motion to suppress evidence under Rule 41 (e) is not a final order in an independent plenary action and appealable merely because the motion was made prior to the return of the indictment and in particular where the order is entered after the return of the indictment. Also, in accord with this position are the Courts of Appeal for the Fourth Circuit, *United States* v. *Williams*, 227 F.2d 149; the Fifth Circuit, *Zacarias* v. *United States*, 261 F.2d 416, cert. denied, 359 U.S. 935; and the District of

Columbia, *Nelson* v. *United States*, 208 F.2d 505, cert. denied, 346 U.S. 827. A contrary view is supported by the Second Circuit, *Cheng Wai* v. *United States*, 125 F.2d 915; *DiBella* v. *United States*, 284 F.2d 897; and the Third Circuit, *In re Sana Laboratories*, 115 F.2d 717, cert. denied 312 U.S. 688.

Because of the present position of the petitioner in this case, as set forth in Points I and II of its Brief, and the constant position of the petitioner in the *DiBella* case, the respondent adopts the petitioner's arguments in so far as they relate to the above. The respondent does not accept, nor does he adopt, the petitioner's argument under Point III of its Brief.

As to petitioner's Point III, and now the respondent's only argument to be made in this Brief, the respondent will first contend that the finality of an order deciding a motion to suppress does not affect the appealability of the order, and second that the order is binding.

I.

The Final Feature of an Order Deciding a Motion to Suppress Evidence Cannot Affect the Appealability of the Order.

Both the petitioner and respondent agree that the instant motion to suppress evidence is part of the criminal case and not in any fashion an independent action. Finality of an order does not in and by itself change the character of any criminal case, once it is determined that the order is part of the said criminal case. For example, a defendant in a criminal case may attack the indictment or information by a motion to dismiss. An order is entered denying his motion. This order is as final as any example possible in any criminal case. However, the finality of this

order does not give it appealability because it is not entered in an independent action. The motion was filed as part of the criminal case; it was heard as part of the criminal case; it was decided as part of the criminal case; and its only purpose—to affect the outcome of the criminal case. Even if this motion, in the above example, were granted, the Government's right to appeal comes only from the criminal statutes, in particular 18 U.S.C. § 3731, as this is a criminal matter and the appellate rights of the Government are strictly controlled by the Criminal Appeals Act, as amended and found in the Code as above mentioned. The finality of the order in the above example did not change the nature of the criminal action and did not make a motion which was part of a criminal case in the first instance, a motion giving rise to an independent plenary action, and appealable under 28 U.S.C. 1291.

The case of *United States* v. *Williams*, 227 F.2d 149 (C.A. 4, 1955) supports the above. Therein a defendant filed motions about a week after he had waived his hearing before the commissioner, asking the lower court to suppress the evidence, to dismiss the criminal action and to quash whatever indictment might be returned based upon the illegally seized evidence. About two months later an indictment was returned. Some months later the motions were heard and granted, and the court ordered the case dismissed. The Government appealed more than thirty (30) days after the entry of the order. The court, at page 151, held:

> "We think, however, that the appeal must be dismissed. The order was not a final order made in a civil proceeding, from which an appeal would lie and from which the Government would have 60 days in which to take an appeal, but an order in a criminal proceeding. The motion was entitled in the criminal

proceeding and the relief asked was, not return of the contraband liquor or the restraint generally of officers of the law, but the suppression of evidence in the criminal proceeding, the quashing of the indictment therein, and the dismissal of the proceeding. The order was entered in the criminal proceeding and it granted the motion as made and dismissed the proceeding. In so far as it related to the suppression of the evidence, the order was clearly interlocutory and not independently appealable. *Cogen* v. *United States*, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; *United States* v. *Wallace and Tiernan Co.*, 336 U.S. 793, 69 S.Ct. 824, 93 L.Ed. 1042. In so far as it ordered a dismissal of the indictment in the case, it was not taken within 30 days and must be dismissed for that reason under Rule 37 of the Federal Rules of Criminal Procedure, 18 U.S.C.A."

No court would have permitted the respondent herein to appeal from an order denying his motion to suppress had the respondent filed his motion in the district of trial and subsequent to the return of the indictment, and yet the order denying his motion could only be termed "final". The finality of that order would not give it appealability because of this Court's rule against fragmentary appeals, especially in criminal cases. See *Cobbledick* v. *United States*, 309 U.S. 323, where at page 326 this Court said:

"... An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await

his conviction before its reconsideration by an appellate tribunal."

Thus, the finality of any order denying a defendant's motion in a criminal case, which motion is an integral part or step in a criminal proceeding, does not make it appealable under 28 U.S.C. 1291; and further, the finality of any order granting a defendant's motion in a criminal case, which motion is an integral part or step in a criminal proceeding does not make it any more appealable than whatever final orders may be appealed by the Government under 18 U.S.C. 3731.

It follows that if a motion, by its nature, judged in relation to the case as a whole is part of a criminal case, the finality of any order entered is still part of the same criminal matter and that the "finality" does not change a procedure in a criminal case to an independent and different cause of action.

II.

The Final Order Below Is Binding Upon the Trial Court in This Criminal Case.

The respondent agrees with the petitioner that this order is not *res judicata* as it is not a final judgment in an independent action and it is "familiar law that only a final judgment is *res judicata* as between the parties." *Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28. However, the binding feature of this final order is in dispute. By the injection of the term *res judicata* the petitioner argues that in so far as this order is not *res judicata*, it must logically follow that the order is not binding upon the trial court. In *United States* v. *Wallace and Tiernan Co.*, 336 U.S. 793, relied upon by the petitioner to argue that this order is not *res judicata*, the case does go somewhat further and

does hold that the suppression order in the criminal case was binding as to the evidence in the criminal case. Therein the defendants' books and records were subpoenaed before a grand jury which later returned an indictment against them, and which indictment was later dismissed as the grand jury was illegally constituted. The trial court, after an information was filed, held that the evidence obtained by the Government through use of the above grand jury was not to be used against the defendants in the criminal prosecution. The Government filed a civil proceeding against the defendants and then moved for production of these same books and records. The motion being denied, and the case being dismissed gave rise to the appeal wherein this Court reversed the lower court. This Court's holding was based on the fact that the order in the criminal case did not extend beyond the criminal case as it was a part of the criminal case and limited to the criminal case, and therefore, not a "final judgment" as to be *res judicata* in the civil action. In this regard this Court did state, at page 802:

> ". . . The circumstances here we think show that the order now considered was not one of permanent general 'outlawry' against all use of the documents involved, but an order to prevent their use in a particular criminal proceeding then pending."

In its direct holding, this Court at page 803, stated:

> "We hold that the proceedings leading up to the preclusion order must be deemed a part of the criminal proceedings, see Cogen v. United States, 278 U.S. 221, 227, 73 L.ed. 275, 282, 49 S.Ct. 118; that the order did not preclude use of the documents except in these proceedings: . . ."

the duty of the trial court to entertain proper objections "even where a motion to return the papers may have been denied before trial," this Court in *Gouled* stressed that a "rule of practice must not be allowed for any technical reason to prevail over a constitutional right." It becomes apparent that the reason for the holding was based upon the importance of constitutional rights of any defendant under the Amendments to the United States Constitution.

The respondent has been unable to find any case where a trial court reopened the matter of a reasonableness of a search and seizure after the *grant* of a pretrial motion to suppress. It is interesting to note, however, that those courts holding that the *denial* of a motion to suppress is binding, stress the comity that exists between courts of coordinate jurisdiction and the requirements of efficient trial procedure. See *United States* v. *Wheeler*, 256 F.2d 745 (C.A. 3, 1958), cert. denied, 358 U.S. 873, which takes the strict view in this regard but which also recognizes that a defendant's constitutional safeguards are superior to any theory of comity or efficient trial procedure. See also *United States* v. *Brewer*, 24 F.R.D. 129 (N.D. Ga., 1959). For a less strict view of the above, permitting more discretion in the trial court to reconsider a *denial* of a motion to suppress, see *Waldron* v. *United States*, 219 F.2d 37 (C.A. D.C., 1955) (still stressing, however, at page 41, that once "the court has disposed of a point concerning the admission or exclusion of evidence, litigants must proceed to try the case accordingly."); *Gatewood* v. *United States*, 209 F.2d 789 (C.A. D.C., 1953) (at page 793, "that under Rule 41 (e) a pretrial denial of a motion . . . is not binding on the trial judge"—stressing the unconstitutionality of the search and seizure and the *denial* of the motion objecting to the same.).

Regardless of which view is followed, the courts all agree that the binding quality of a *denial* of a motion to

suppress comes under the theory of comity that exists between courts or judges of coordinate jurisdiction and/or, the requirements of efficient and orderly trial procedures. The above binding feature is only overcome in the above cases by the constitutional rights guaranteed to any individual under the Amendments to the United States Constitution. See *Gouled* v. *United States*, 255 U.S. 298.

It would appear, then, that there is a difference between the binding effect of a *grant* and that of a *denial* of a motion to suppress. This difference being the constitutional rights enjoyed by an individual.

Under what theory then can the petitioner seek to reopen or have the trial court in this case reconsider an individual's motion to suppress? If opportunity it had, this should have been by a petition for re-hearing to the district judge issuing the *grant* of this respondent's motion to suppress shortly after the order was entered. If the petitioner then had proper grounds, based upon fact or law, or both, the district judge presiding in the district of seizure and who had issued the grant, should have been given an opportunity to reconsider his decision as this is the better trial procedure and obviously avoids multiple full hearings. As this order stands now, the petitioner must file something other than the usual pleading for rehearing as some two years—less a week or two—have transpired since the order was entered and this respondent still sits in jail awaiting his trial—which trial has constantly been postponed over objection of this respondent because of the petitioner's requests.

It is the respondent's position that this order *granting* his pretrial motion to suppress, which motion is a part of the criminal case, is final as such to be binding in the instant criminal case.

Conclusion

Because of that portion of the petitioner's argument adopted herein and because of the aforesaid, it is respectfully submitted that the judgment of the Fifth Circuit Court of Appeals be affirmed as to lack of jurisdiction for petitioner to appeal.

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